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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

ORLANDO HERNANDEZ SILVA,

Defendant and Appellant.

F062982

(Madera Sup. Ct. No. MCR036588)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Madera County. Joseph A. Soldani, Judge.

Rex Williams, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Ryan B. McCarroll, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Cornell, Acting P.J., Poochigian, J. and Franson, J.

## **INTRODUCTION**

Appellant Orlando Hernandez Silva appeals from a judgment of sentence following a plea of nolo contendere to one count of gross vehicular manslaughter while intoxicated (Pen. Code,<sup>1</sup> § 191.5, subd. (a)) with the infliction of bodily injury on two additional victims during the commission of that substantive offense (Veh. Code, § 23558).

## **STATEMENT OF THE CASE**

On March 21, 2011, appellant pleaded nolo contendere to gross vehicular manslaughter while intoxicated and admitted that he caused bodily injury to two additional victims. In exchange, the court agreed to a term of imprisonment not to exceed eight years and further agreed to grant the prosecution's motion to dismiss other pending charges (§ 1385).

On June 10, 2011, the court sentenced appellant to eight years in state prison. The court imposed the middle term of six years on the substantive count and a consecutive term of one year for each bodily injury enhancement. The court awarded 876 days of custody credits, suspended appellant's driving privilege for three years, and ordered appellant to pay \$750 in costs for preparation of the presentence report.

On July 29, 2011, appellant filed a timely notice of appeal.

## **STATEMENT OF FACTS<sup>2</sup>**

On November 4, 2009, appellant's vehicle traveled at a high rate of speed and collided with vehicles driven by Vanessa Ponce and Leonardo Ayala. The collision occurred at Avenue 12 and Road 25 in Madera County. Appellant's vehicle traveled eastbound on Avenue 12 and wove in and out of traffic. The force of the collision caused appellant's

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise stated.

<sup>2</sup> In his declaration regarding his guilty plea dated March 21, 2011, appellant stipulated to admission of the preliminary hearing transcript to establish a factual basis for the plea. The statement of facts is taken from the reporter's transcript of the preliminary hearing dated August 27, 2010, and the report of the probation officer dated April 21, 2011.

vehicle to fly in the air and overturn several times. Ayala's passenger, Aaron Fernandez, died in the collision from hemoperitoneum<sup>3</sup> and lacerations of the liver. A preliminary screening revealed that appellant had a blood-alcohol level of 0.21 percent.

## **DISCUSSION**

### **I. THE TRIAL COURT PROPERLY DECLINED TO GRANT PROBATION.**

Appellant contends the sentence should be vacated and the matter remanded for new sentencing because the trial court did not understand the scope of its discretion to grant probation in his case.

#### **A. Appellant's Specific Contention**

He specifically argues:

"At the sentencing hearing, the court found appellant presumptively ineligible for probation pursuant to [Penal Code section 1203, subdivision (e)(3)] and denied probation on that basis. The court stated that the case may be unusual so as to overcome the presumption. However, the court also stated appellant was not suitable for probation in part because he caused injury and death. [¶] The sentence should be vacated and the case should be remanded for a new sentencing hearing. Section 1203, subdivision (e)(3) did not render appellant ineligible for probation. That section provides that any person who willfully causes great bodily injury in the commission of an offense is presumptively ineligible for probation. Because appellant did not willfully cause bodily injury, that section did not apply...."

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<sup>3</sup> "Hemoperitoneum" means "blood in the peritoneal cavity." The peritoneum is "the serous sac, consisting of mesothelium and a thin layer of irregular connective tissue, that lines the abdominal cavity and covers most of the viscera contained therein; it forms two sacs: the peritoneal (or greater) sac and the omental bursa (lesser sac) connected by the foramen epiploicum." (Stedman's Medical Dict. (25th ed. 1990) pp. 701, 1170.)

### **B. Report of the Probation Officer**

The report of the probation officer dated April 21, 2011, stated: “Pursuant to Penal Code Section 1203(e)(3), the defendant is presumptively ineligible for probation, as serious bodily injury causing death was inflicted upon the victim as a result of the defendant’s crime.”

### **C. Statement of the Court at Sentencing**

At the June 10, 2011, sentencing hearing, the court stated: “Regarding the defendant’s eligibility for probation I believe he’s presumptively ineligible. There are factors that would indicate that he is – this may be an unusual case for purposes of probation that he may overcome that presumption. However, this is not a case where probation in the Court’s opinion should be granted just because of the horrific nature of the case. The fact that the victims were vulnerable in this matter. They were driving down the road as passengers and he came along with the blood alcohol level of .20, going 80 miles an hour through an intersection and trying to pass, ending up just going airborne and landing on top of a vehicle, killing an individual and causing great bodily injury to the other. This is just not a case involving probation....”

### **D. Applicable Law**

“Except in unusual cases where the interests of justice would best be served if the person is granted probation, probation shall not be granted to any of the following persons: [¶] ... [¶] (3) Any person who willfully inflicted great bodily injury or torture in the perpetration of the crime of which he or she has been convicted.” (§ 1203, subd. (e)(3).) “The word ‘willfully,’ when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage.” (§ 7.)

### **E. Analysis**

Appellant contends he did not willfully cause bodily injury, section 1203, subdivision (e)(3) did not apply in his case, the court misunderstood the scope of its discretion to grant

probation, and a remand for resentencing is appropriate. Appellant's claim that the trial court misunderstood the scope of its discretion to grant probation is not supported by the record. The trial court initially noted that it believed the appellant was "presumptively ineligible" for probation. The court then noted that there were factors that indicated appellant's case might be characterized as "an unusual case for purposes of probation that he may overcome that presumption." The court ultimately concluded that probation should not be granted for a number of reasons, i.e., the horrific nature of the case, the vulnerability of the victims who were passengers in other vehicles, appellant's blood-alcohol level of at least 0.20 percent, and his operation of a motor vehicle at a speed of 80 miles per hour while traveling through an intersection and attempting to pass the other vehicles.

Given the totality of the comments during sentencing, the trial court found appellant was unsuitable for probation, whether or not appellant was eligible for probation in the first place. If alleged sentencing error entails a misunderstanding concerning the scope of the court's discretion, an order remanding the case for a new sentencing hearing is not required if it is virtually certain the court will impose the same sentence on remand. (*People v. Coelho* (2001) 89 Cal.App.4th 861, 889-890.) Here, the sentencing court expressed a "preliminary inclination" to follow the sentencing recommendation of the probation officer "based on the defendant's unsuitability for probation and the seriousness of the crime." Given the court's views, it is virtually certain the court would impose the same sentence on remand. Expressed another way, it is not reasonably probable the sentencing court would have imposed a more favorable sentence had the probation officer omitted the citation to section 1203, subdivision (e)(3).

Remand for further sentencing proceedings is not required.

## **II. THE TRIAL COURT PROPERLY ORDERED APPELLANT TO PAY THE COSTS OF PREPARATION OF THE PRESENTENCE REPORT.**

Appellant contends the trial court erroneously ordered him to pay a \$750 presentence report fee because there was insufficient evidence to show he had the ability to pay the fee.

### **A. Imposition of the Fee**

The pre-plea report of the probation officer filed May 17, 2010, recommended a “\$330 Presentence report fee.” The report and recommendation of the probation officer dated April 21, 2011, recommended a “\$750 Presentence report fee.” At the June 10, 2011, sentencing hearing, the court stated: “Counsel I know has a copy of the report and the supplemental report regarding time credits. Any additions, corrections, deletions to the report itself?” Appellant’s counsel responded in the negative. After hearing the arguments of counsel, the court stated at sentencing: “The Court also orders that the defendant pay a [\$]750 presentence report fee.”

### **B. Appellant’s Specific Contention**

Appellant contends: “The authority to impose such a fee derives from section 1203.1b. [Citations.] Imposition of such a fee requires evidence that the defendant has the ability to pay the fee. [Citation.] [¶] [A]ppellant was last employed in 2009, earning \$9.50 per hour. [Citation.] Because there is no evidence appellant has the ability to pay the fee for the presentence report prepared by probation, the fee should be stricken.”

### **C. Governing Law**

Section 1203.1b, subdivision (a) permits the sentencing court to order defendant to pay the reasonable costs of the preparation of any presentence probation report. “The probation officer, or his or her authorized representative, shall determine the amount of payment and the manner in which the payments shall be made to the county, based upon the defendant’s ability to pay. The probation officer shall inform the defendant that the defendant is entitled to a hearing, that includes the right to counsel, in which the court shall make a determination of the defendant’s ability to pay and the payment amount. The defendant must waive the right to a determination by the court of his or her ability to pay and the payment amount by a knowing

and intelligent waiver.” (§ 1203.1b, subd. (a).) If the defendant does not waive his right to a hearing, the probation officer is to refer the matter to the court for the scheduling of a hearing to determine the amount of payment and the manner in which the payment shall be made. (§ 1203.1b, subd. (b).)

In *People v. Valtakis* (2003) 105 Cal.App.4th 1066 (*Valtakis*), cited by respondent, the court held that defendant’s failure to object to fees imposed pursuant to Penal Code section 1203.1b waived the error on appeal. *Valtakis* found that the antiwaiver language in the statute did not speak to appellate review and that counsel still needed to preserve claims for appellate review by lodging an appropriate objection. (*Valtakis, supra*, at p. 1075.) *Valtakis* further held that a defendant’s failure to object at the sentencing hearing to noncompliance with section 1203.1b’s statutory procedures constituted a waiver of the claim on appeal, consistent with the general waiver rules discussed in *People v. Welch* (1993) 5 Cal.4th 228 (*Welch*) and *People v. Scott* (1994) 9 Cal.4th 331 (*Scott*):

“[T]o construe the language [in the statute] as abrogating *Welch* and *Scott* ... would work results horribly at odds with the overarching cost conservation policy of the section. ‘Statutes should be construed to produce a reasonable result consistent with the legislative purpose. [Citation.] The object to be achieved and the evil to be prevented are prime considerations in determining legislative intent.’ [Citation.] If needed to avoid absurd consequences, the intent of an enactment prevails over the letter and the letter will, if possible, be read so as to conform to the spirit of the act. [Citation.] Here the antiwaiver language that helps shield defendants against fees beyond their ability to pay subverts a greater purpose of conserving the public fisc [citations], a purpose that would be sacrificed if we adopted [defendant’s] reading. Criminal defendants often lack the means to pay high recoupment fees, and so the amounts imposed are relatively modest in most of the cases we see. To allow a defendant and his counsel to stand silently by as the court imposes a \$250 fee, as here, and then contest this for the first time on an appeal that drains the public fisc of many thousands of dollars in court and appointed counsel costs, would be hideously counterproductive. It would also be completely unnecessary, for the Legislature has provided mechanisms in section 1203.1b for adjusting fees and reevaluating ability to pay *without an appeal* anytime during the

probationary period [citation] or the pendency of any judgment [citation].” (*Valtakis, supra*, 105 Cal.App.4th at pp. 1075-1076, italics in original.)

#### **D. Analysis**

We agree with the reasoning of *Valtakis* that defendant’s failure to object at sentencing to the imposition of fees pursuant to section 1203.1b forfeits his claim on appeal. (See *Welch, supra*, 5 Cal.4th at p. 235.) Moreover, appellant was advised in the probation officer’s report about the recommendation for the presentence report fees. Appellant failed to raise the issue of ability to pay during the sentencing hearing either before or after the trial court made its ruling. If appellant had raised the issue, the court could have made factual findings at the sentencing hearing regarding defendant’s ability to pay. Appellant could have easily raised these same objections to the court’s noncompliance with the presentence report fee procedures at the sentencing proceeding.

We note that appellant relies on *People v. Pacheco* (2010) 187 Cal.App.4th 1392 (*Pacheco*), in which the defendant claimed that the trial court erroneously imposed various statutory fees, including a \$64 per month probation supervision fee under section 1203.1b, “without determining his ability to pay these fees, and that there [was] insufficient evidence to support any such determination.” (*Pacheco, supra*, at p. 1397.) The Sixth Appellate District allowed the defendant to raise these issues on appeal, despite his failure to first object to the absence of an ability to pay determination in the trial court. (*Ibid.*) The *Pacheco* court reasoned that the defendant’s claims were “based on the insufficiency of the evidence to support the order or judgment. [S]uch claims do not require assertion in the court below to be preserved on appeal. [Citations.]”<sup>4</sup> (*Ibid.*)

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<sup>4</sup> In *Scott*, the Supreme Court held: “We conclude that the waiver doctrine should apply to claims involving the trial court’s failure to properly make or articulate its discretionary sentencing choices.” (*Scott, supra*, 9 Cal.4th at p. 353.) We note the *Pacheco* court concluded: “... Pacheco’s claims are not forfeited or waived on appeal ....” (*Pacheco, supra*, 187 Cal.App.4th at p. 1397.) Although the terms “waiver” and “forfeiture” have long been used interchangeably, they do have distinct meanings.

We agree with the general proposition in *Pacheco* that sufficiency of the evidence claims are preserved for appeal even in the absence of an objection at the trial level. Nevertheless, we find *Pacheco* distinguishable from the instant case for several reasons. First, the fees imposed in *Pacheco* were not for the costs of the preparation of the presentence probation report. Rather, the fees imposed consisted of a criminal justice administration fee, a probation supervision fee, an attorney's fee, a court security fee, and a booking fee. (*Pacheco*, *supra*, 187 Cal.App.4th at pp. 1396-1397.) Second, the defendant in *Pacheco* was granted probation while the court here sentenced defendant to state prison. (*Id.* at p. 1396.) Third, some of the fees in *Pacheco* were impermissibly imposed as conditions of the defendant's probation. This made them independently erroneous regardless of the existence of substantial evidence to support the amounts imposed. (*Id.* at pp. 1402-1404.)

Appellant's failure to object at sentencing to the asserted noncompliance with the probation fee procedures under section 1203.1b forfeited the claim on appeal.

### **DISPOSITION**

The judgment is affirmed.

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(*People v. Saunders* (1993) 5 Cal.4th 580, 590, fn. 6.) "Forfeiture" refers to a failure to object or to invoke a right, whereas the term "waiver" conveys an express relinquishment of a right or privilege. (*United States v. Olano* (1993) 507 U.S. 725, 731-733.) A right may be forfeited in a criminal case by the failure to make a timely assertion of the right before a tribunal having jurisdiction to determine it. (*Yakus v. United States* (1944) 321 U.S. 414, 444.) Because it is most accurate to describe the failure to object in the trial court as a "forfeiture" of a claim, we have characterized this issue as one of forfeiture. (See *People v. Simon* (2001) 25 Cal.4th 1082, 1097, fn. 9.)